No. 80-1334

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In The

Supreme Court of the United States

October Term, 1980

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Petitionets,

vs.

SRECKO BARULIC,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

KENNETH HELLER
Attorney for Respondent
227 Broadway
New York, New York 10007
(212) 962-6085

FRED R. PROFETA, JR.
Of Counsel

4786 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

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PRELIMINARY STATEMENT

Petitioners would have this Court believe that this case has something to do with *Santos v. Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir. 1979), *cert. granted, Scindia Steam Navigation Co. v. De Los Santos,* (No. 79-512), 100 Sup. Ct. 2150 (1980).

They variously claim that "the writ of certiorari should be granted because the state court has . . . decided an important question of federal law which has not been settled by this Court, but is presently under review on writ of certiorari in *Scindia Steam Navigation Co. v. De Los Santos.*" (Pet. 5),[1] and "the decision of the court below is in accord with the decision of the Ninth Circuit in *Santos v. Scindia Steam Navigation Co.*" (Pet. 7).

Petitioners are entirely in error. The question which this Court has under review in *Santos* is whether the general duty of "reasonable care under the circumstances" is applicable to a longshoreman's negligence action against a shipowner where the *stevedore* has *control* of the work area in question. The Ninth Circuit made it quite clear in *Santos* that: "The District Court found that the stevedore had *exclusive control* of the gear and the premises during the relevant time." (598 F. 2d at 490) (emphasis added). All of the cases cited in footnotes no. 15 and 17 on pages 8 and 9 of the petition relate to fact situations wherein the stevedore had control of the work area. In such a situation, there well may be a conflict between the circuits. But, as we will demonstrate below, one thing is absolutely certain under federal maritime law — where the *shipowner* retains control of the premises there is, and always has been, a general duty of "reasonable care under the circumstances" to any person lawfully on board the vessel.

Shipowner's retention of control herein will be manifest from an inspection of the Statement of Facts below. Moreover, the factual issue is foreclosed, inasmuch as the New York Appellate Division has explicitly found that "there is no showing on this record that the work area had come under the sole or exclusive control of the stevedore." (A6). Thus, the charge of the trial court to the jury was absolutely correct with respect to negligence; *i.e.*,

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1. "Pet." refers to petition for writ of certiorari; "A" to appendix thereto.

"it is the absence of such care as a reasonably prudent person would be expected to use under the circumstances." (A21).

Petitioners also fail to apprise this Court of another specific factual finding below. The Appellate Division stated that "there is a showing of active negligence on the part of the shipowner in *creating* a hazardous condition and in negligently failing to correct it." (A6) (emphasis added). Again, on the facts and the law discussed below, we will show that this situation has always led to unremitting liability under federal maritime law to any person injured by reason of a shipowner-created condition. Furthermore, we also note that petitioners are precluded on this writ, as a matter of New York state law, because they failed to object to the charge below (R230)[2]. *Petosa v. City of New York*, 52 A.D. 2d 919, 920 (2nd Dept. 1976).

STATEMENT OF FACTS

The respondent longshoreman received severe leg injuries aboard petitioners' luxury liner, The SS France, on December 20, 1972. He was injured in the galley of that vessel when he slipped upon a greasy condition concedely created by petitioners' own employees in an area under *their* control. His cause arises under the 1972 Longshoremen's Act (33 U.S.C. §901, *et seq.*).

This was no ordinary longshore operation, where the stevedore assumes complete control of the ship's hold and loads or discharges cargo. Rather, the longshoremen involved in this instance were bringing food through the galley of a luxury liner, where members of the ship's crew continued to work and eat. As Mr. Barulic described the site of his accident:

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2. Page references to the record on appeal filed in the Appellate Division are cited "R".

> "Q. Now, sir, at the time you were — near what area of the ship were you working near the galley? A. Yeah. Look like kitchen. There was kitchen that people eat, crew men would eat. They cooking, They washing dishes. You know, that's the place where we work." (R20).

Respondent was positioned on the tile floor of the galley (R22). He was working with an "electric escalator" that extended from the dock into the side of the ship (R15). As he described it, "they come food from the dock on the ship. I take that food, I loading on four-wheelers" (R15). The "four-wheelers" were hand trucks on which Mr. Barulic placed boxes and crates of food (R16). Other longshoremen would maneuver the hand trucks through the galley to an elevator that would bring the food down into the refrigerated spaces of the ship (R16).

Mr. Barulic's account of his accident was concise and to the point:

> "We started work one o'clock afternoon. There was floor clean, nice, that is not was bad. Then we started working a couple hours, about four o'clock, something about four o'clock, they started washing dishes, so that water the little by little, the ship leans that side where I standing where I be working, the ship would list. The water come little by little down on my foot. So I working, I complain. I call the man. I said 'Please take that water or I stop work.'" (R20-21).

At this point, the shipowner has negligently created a hazardous condition, and if injury ensues, liability should attach under established principles of law. But there is more. As Mr. Barulic went on to say:

> "So the men, they come, they tried — there was right there on the side of me some kind of drain, some kind of a hole that the water got to go out the ship.
>
> So the man come, must be something like a spoon, knife. They come to clean up that drain. They try to do it, clean it up. The water is a little bit go out, but not so everything. They stay, all the grease, soap, everything from the washing dishes." (R21).

Now the shipowner is doubly liable, for it undertook to eliminate its own hazard and bungled the job. There is no maritime decision which disavows this axiom. The respondent's account then ends with superadded nonfeasance and ultimate injury:

> "So I told him 'Come back again, bring some mop to clean it up because I can't work, I got to stop.'
>
> They say to me 'Yes I come. I clean it up.'
>
> That time — loading that time fish in wood case about seventy pound case — sixty, seventy pound case . . . . So I had to make the twist fast, then my foot slip. There was all my shoes all grease or soap, a mess. I slip, I fall down, I hit with the leg on the floor here (indicating). Then another man pick me up. Then I go on the side, I sit down about twenty minutes." (R21-22).

Petitioners make the claim that Barulic did ask some "unidentified person" to remedy the condition (Pet. 3). The facts are different. Respondent made it quite clear, on cross-examination, that he had complained to a "crew man" (R38). He

also described him as "the man belonging to cleaning up that" (R42), and notes that he had told two or three men to clean up the mess they had made or he was stopping (R47).

Mr. Mate Radman, a longshoreman whose job it had been to push the hand trucks from the escalator to the elevator on the day of the accident (R116), described in these words the efforts of the ship's crew to correct the greasy condition they had created:

> "So we called the ship man from the ship guys. He come. He started cleaning them up. I don't know how. I know was far away and he doesn't do nothing because he can't clean them up. Water still coming out from the dishwasher, same area we was work." (R117-118).

One thing is certainly clear — the ship's crew did not utilize any wires or snakes to properly unplug the drain which was backing up the soap and grease (R22, 118).

After the accident, Mr. Barulic felt the pain in his left knee "right away" (R24), but after he rested for about twenty minutes (R22), he returned to work (R24). Then "that same guy bring piece of plywood, they put underneath the foot where I standing so I could work there" (R23).

Petitioners also indict Barulic for failing "to stop working" (Pet. 3), but, as noted above, Barulic *did* tell the crew member in question that he would stop unless the mess were cleaned (R21, 47). Moreover, as Radman put it:

> "Listen, we was continue working because we have to get to load the ship, the stores . . . because the ship got to leave." (R120).

Petitioners argue that the "stevedore" took no action to correct the slippery condition (Pet. 4). But this misses the point. At best, the galley was a conduit through which the stores passed on the way to the refrigerated spaces. Petitioners never relinquished control of the galley while respondent took crates and boxes off the electric escalator; in fact, the crew proceeded with the dishwashing a mere four yards behind him (R37, 116-117). Cooking continued while respondent moved the stores (R20). Indeed, it is difficult to imagine French cooks *ever* surrendering control of their galley to an unsophisticated laborer.

In fact, with respect to the galley of The SS France, Radman testified that it was the "practice" of the "guys from the ship" to "clean it up" (R120). Even petitioners' attorney conceded that "ordinary cleanings were in the Steward's department" (R140). And Theodore R. Alff, respondents' "stevedore expert", actually testified that it is "the ship's function to open a drain" (R177).

Undaunted, petitioners go on to contend that Barulic "failed to . . . report the dangerous condition to the stevedore's hatch boss" (Pet. 3). The trial court graphically described the absurdity of this position in its questioning of Alff:

> "THE COURT: If a longshoreman were working on a boat and a crewmember was mopping up four feet away from him and splashing water all over the place, this longshoreman would not tell that crewmember to stop splashing the water?
>
> THE WITNESS: Yes, he would.
>
> THE COURT: You bet he would.
>
> THE WITNESS: He should.
>
> THE COURT: Okay. Next question." (R170).

REASONS FOR DENYING THE WRIT

I.

The jury was properly charged to apply the standard of "reasonable care under the circumstances".

On pages 7 through 9 of the petition, the argument is repeatedly made that the stevedore has "primary responsibility" for determining whether its employee should continue working in spite of "potentially dangerous conditions". An ominous spectre is conjured up:

> "If the shipowner is to be held liable virtually vicariously for a failure to supervise the judgment of the expert and experienced independent stevedore contractor in safety matters, drastic burdens have been imposed on the shipowner." (Pet. 9).

Again, these nicely turned arguments simply have nothing to do with this case. The stevedore has no business "supervising" shipowner activity on the bridge, in the engine room, or (as in this case), in the galley of a luxury liner. Before the control of an area passes to the stevedore, the longshoreman is like any other business invitee to whom the shipowner owes a duty of reasonable care under the circumstances. As the court stated in *McDonald v. United States,* 321 F. 2d 437 (3rd Cir. 1963), *cert. denied,* 375 U.S. 969:

> "*The shipowner in possession and control owes a duty of reasonable care to workmen who come aboard the vessel to make repairs.* The duty is to exercise reasonable care to furnish the workmen with a safe place to work. *Mesle v. Kea*

> *Steamship Corporation,* 260 F. 2d 747 (3rd Cir. 1958), cert. den. 359 U.S. 966, 79 S. Ct. 875, 3 L. Ed. 2d 834 (1959); *Barbazon v. Belships Co.,* 202 F. 2d 904 (3rd Cir. 1953)." (320 F. 2d at 440) (emphasis added).

To the same effect in *Copeland v. Oil Transport, Inc.,* 352 F. Supp. 11, 17 (S.D. Ala. 1973).

The law respecting a shipowner "in possession and control" was settled by this Court in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959). The plaintiff, Joseph Kermarec, had boarded defendant's vessel in order to bring a package to a member of the ship's crew. Upon leaving the vessel, the plaintiff fell and was injured while descending a stairway. The district judge applied then-prevailing New York law, held that the plaintiff was a "gratuitous licensee", and overturned a jury verdict in plaintiff's favor upon the ground that there had been a failure of proof that the shipowner had *actually known* of a defective condition on the stairway (358 U.S. at 627-28). This Court reversed, finding that actual knowledge was not required because:

> "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests *the duty of exercising reasonable care under the circumstances of each case.*" (358 U.S. at 632) (emphasis added).

Petitioners' failure of proof in this regard is certainly understandable. In *this* particular case, involving the working galley of a passenger liner populated by the ship's cooks going about their normal business, it would be absurd to conclude that respondent and his fellow shoreside laborers had taken over. In

fact, petitioners concede the issue of control by proving its correlative; *i.e.*, they *admit* that the ship retained the duty to clean the galley and eliminate exactly the sort of hazard which caused the respondent's injury.

To begin with, petitioners' own attorney made the following concessions with respect to control and maintenance of the galley area in question:

> "I think we can agree that the *ordinary cleanings* were in the steward's department. I will stipulate to that. . . . According to the law, *the FRANCE is charged with maintaining its equipment.* I will concede that for you. *Under the law, we can't say it is somebody else some local contractor here.* The FRANCE is responsible for maintaining its equipment. I will concede that." (R140-41) (emphasis added).

Indeed, it would be a strange situation were the proprietor of a kitchen on a luxury liner *not* charged with a duty to maintain cleanliness therein. Respondent's "stevedore expert" testified in total accordance with the rather self-evident customs described herein. Theodore R. Alff conceded that the maintenance required in the instant situation was entirely the province of the ship's crew:

> "Well, would you agree, sir, with this statement: That the ordinary steward's department of a ship, they have equipment like wire snakes or wire equipment to open up a drain that gets stopped? A. I'm sure they do.
>
> Q. All right. That's the ship's function to open a drain, wouldn't you agree with that, sir? A. That's right." (R177).

And, as mentioned above, Alff contended that the stevedore hatch boss "should get ahold of the mate of the vessel . . . to have the situation cleaned up" (R162). Obviously, if only the shipowner was allowed to eliminate the dangerous condition in this instance, then the element of control could not have been delegated.

Furthermore, as mentioned above, the Appellate Division specifically found that there was no showing of control having passed to the stevedore (A6).

Petitioners rely heavily upon the "conflict" between the circuits regarding the standard of care to be applied in the typical longshore case. We are told that the Second, Fourth, Fifth and Seventh Circuits hold that a shipowner is not liable for conditions "whose danger is known or obvious" to the stevedore (Pet. 5, 8), but petitioners fail to inform this Court that all of the decisions relied upon by them make it crystal clear that the stevedores therein had assumed control of the work area. For example, in *Giglio v. Farrell Lines, Inc.*, 613 F. 2d 429 (2d Cir. 1980), the last reported Second Circuit decision on this subject, Judge Meskill made it perfectly plain that the area in question "was within the sole control of the stevedore. . . ." (613 F. 2d at 433). The point is nicely made in *Sarauw v. Oceanic Navigation Corp.*, 622 F. 2d 1168 (3rd Cir. 1980), No. 80-245 *on petition for certiorari,* where the plaintiff, a longshoreman in the employ of Hess, was injured when he fell from a gangway "owned by Hess" and which "was put in place by Hess personnel." (622 F. 2d at 1171). Defendant Oceanic contended that these facts precluded liability on its part. But the Third Circuit disagreed:

> "Oceanic argues that the line of vessel liability has been drawn on the simple basis of determining who owns the equipment involved in the injury. Oceanic likens the ownership of the

gangway in this case to the ownership of the crane causing injury in *Hurst*, which we held to be the exclusive responsibility of the stevedore.

A careful examination of the three principal cases cited by Oceanic reveals that our linedrawing has not been so simplistic. It was not ownership of the crane, *but the degree of control over its operation, that was determinative in Hurst. See* 544 F. 2d at 1251-52. *Retained control was also the critical factual issue in Rich. See* 596 F. 2d at 550. As explained in *Griffith*, the evidence in *Rich* 'showed beyond a doubt' that the *stevedoring company, rather than the vessel, was 'in complete charge of the details* of handling of the containers [on which the injury occurred].'" *Griffith*, 610 F. 2d at 124 (quoting, with emphasis added, *Rich*, 596 F. 2d at 557).

In *Hurst*, some cables slipped off a hook at the end of a crane, operating without a safety catch, while the crane was being used to hoist cargo from the ship's hold. The crane from which the hook was appended was land-based and was the means by which the ship was unloaded. Unloading the ship was the primary function of the stevedore, and the crane was an integral part of that operation over which the vessel owner had no control. *In contrast, the gangway here was not in the exclusive control of the stevedore.* Here, although the stevedore owned the gangway, the vessel owner did not surrender control over the manner in which the gangway was to be secured." (622 F. 2d at 1172) (emphasis added).

If a shipowner is liable for injuries caused by stevedore-owned equipment in a shipowner-controlled area, *a fortiori*, a shipowner is liable when the damage is done by its own equipment operating within its own area of control.

Factors of shipowner control were also determinative in the following cases: *Cox v. Flota Merchante Grancolombiana, S.A.*, 577 F. 2d 798, 804 (2d Cir. 1978); *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F. 2d 837, 840 (2d Cir. 1977); *Hickman v. Jugoslavenska Linigska, etc.*, 570 F. 2d 449, 451-52 (2d Cir. 1978); *Ruffino v. Scindia Steam Navigation Co.*, 559 F. 2d 861, 862 (2d Cir. 1977); *Brown v. Mitsubishi Shintaku Ginko*, 550 F. 2d 211, 334 (5th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233, 1240 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F. 2d 757, 758 (4th Cir. 1976); *Bess v. Agromar Line*, 518 F. 2d 738, 742 (4th Cir. 1975) and *Ramirez v. Toko Kaiun KK*, 385 F. Supp. 644, 646 (N.D. Cal. 1974).

II.

Shipowner's liability arises independently by reason of its creation of the hazardous condition.

Petitioners make no mention of the Appellate Division finding that "there is a showing of active negligence on the part of the shipowner in *creating* a hazardous condition and in negligently failing to correct it." (A6) (emphasis added). Thus, regardless of the decision of this Court in *Santos*, respondent must prevail herein because petitioners created the slippery condition which caused the injury (R20-21), and then bungled the job of cleaning it up (R21, 117-118). Liability arises inexorably by reason of the shipowner's affirmative act, and the case, therefore, is really one of misfeasance rather than

nonfeasance. Every man, on land or on sea, has a duty to refrain from active and unprivileged conduct which causes injury to another. Prosser, *The Law of Torts*, pp. 338-39 (4th Ed. 1971).

In this regard, it is important to note that both federal and state decisions universally recognize liability for misfeasance. There is no need to find a duty to act arising out of the transaction in question. In fact, the Senate Report which accompanied the 1972 Longshoreman's Act specifically states, in relevant part, that the vessel is liable "where a longshoreman slips on an oil spill on a vessel's deck" and "the vessel put the foreign substance on the deck. . . ." 3 U.S. Code Cong. & Admin. News 1972, p. 4704. Liability was also found in *Canizzo v. Farrell Lines, Inc.*, 579 F. 2d 682 (2d Cir. 1978), where "the ship's crew placed cluster light wires on top of a patch of grease, thereby creating the dangerous condition which was the proximate cause of Canizzo's injury." (579 F. 2d at 685). To the same effect are *Julien v. Lykes Bros. S.S. Co.*, 1977 A.M.C. 241 (E.D. La. 1976); *Smith v. P.B. Tanker Co.*, 541 F. 2d 275, 1976 A.M.C. 2052 (3d Cir. 1976); and *Lederer v. Samuel Broadway Food Corp.*, 33 A.D. 2d 553 (1st Dept. 1969). *See also, Dever v. George Theriot's, Inc.*, 159 So. 2d 602, 604 (Ct. App. La. 1964).

Furthermore, there is an alternative basis for liability herein which is every bit as strong as that premised upon the shipowner's creation of the condition in the first place; *i.e.*, the imperfect attempt on the part of the ship's crew to unclog the drain and remove the water, grease and soap (R20-22, 117-118). Chief Judge Cardozo clearly enunciated the universal rule in *Marks v. Nambil Realty Co., Inc.*, 245 N.Y. 256 (1927). The defendant landlord therein had no duty to repair the stairs in question because they were within the demised premises. But he undertook to do it "and made a bungling job of it" (245 N.Y. at 257). The holding was as follows:

> "The landlord, though a volunteer in making the repairs, is liable, nonetheless, for negligence in making them. '*It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all*' (Glanzer v. Shepard, 233 N.Y. 235, 239). The distinction in such cases is the old one between nonfeasance and misfeasance.
>
> * * *
>
> *The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right.*" (245 N.Y. at 258-59) (emphasis added).

Thus, on the facts of this case and on the explicit findings of the Appellate Division below, the petitioners' responsibility for the respondent's injuries is total, not only because of the retention of control but also due to the affirmative action in creating the condition and imperfectly failing to remedy it. However, even if there were any room for stevedore responsibility and negligence herein, it would make no difference. As the Appellate Division put it below:

> "Even had the injury resulted from the concurrent negligence of the stevedore, it is clear that an injured longshoreman may proceed against the owner of the ship and recover in full for the injuries sustained (*Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S. Ct. 2753, 61 L. Ed. 2d 521)" (A6).

CONCLUSION

For all of the above stated reasons, petitioners' application for a writ of certiorari should be denied in all respects.

Respectfully submitted,

KENNETH HELLER
Attorney for Respondent

FRED R. PROFETA, JR.
Of Counsel

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